United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1053

To Be Argued By:
JOSEPH BEELER

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1053

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UNITED STATES OF AMERICA,

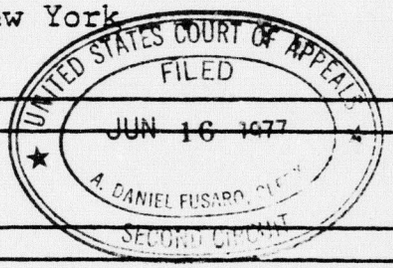
Plaintiff-Appellee,

v.

ERNEST TUCKER and
GAIL ANN TUCKER,

Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District of New York



BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

On July 13, 1976, Defendants-Appellants Ernest Lee Tucker and Gail Ann Tucker were indicted on a charge of 32 violations of 18 U.S.C. §§1341 and 1342, the federal mail fraud statutes, between January 1, 1974 and the date of the indictment. They pleaded not guilty to the charges in the indictment and were tried by jury in the United States District Court for the Southern District of New York, the Honorable Robert J. Ward presiding. At the conclusion of the government's case-in-chief, the prosecution voluntarily withdrew fourteen counts. On December

3, 1976, the jury returned a verdict of guilty on all the remaining eighteen counts for each defendant. Mr. Tucker was sentenced to five years imprisonment and Mrs. Tucker received a sentence of six months imprisonment and three years probation. No opinions were rendered by the Court below.

STATEMENT OF THE FACTS

The alleged mail fraud scheme charged in the indictment began with the placing of advertisements in various national magazines to the effect that Ernest Tucker possessed a money-making secret from which he had earned thousands of dollars, which secret he would share with the public. To those who wrote for the secret and paid $10.00, a booklet was mailed explaining the business of selling fur novelties by mail. The government contended that the initial booklet was misleading and fraudulent, the mail order selling of fur novelties was an unsound business venture, a fact of which the defendants were cognizant, and the defendants sole purpose in business was to make money from the ordering of brochures and mailing materials rather than through the establishment of a mail order novelty business.

The government attempted to establish its case by the presentation of twenty-four witnesses in its case-in-chief and two witnesses in rebuttal.

Letter-Handler-Collection Agents

Nine of the government witnesses were individuals who ordered materials from the defendants for the purpose of engaging in the sale of fur novelties by mail-order. KNUT MYHRE testified that in March or April, 1974, he read an advertisement in Salesman

Magazine for Ernest Tucker's Easy Money Method. He sent $10.00 and received a booklet describing the business of selling fur novelties as an Agent Mail Handler and ordered 2,000 brochures in May, 1974. At the end of June, 1974, he wrote to the company asking for the material and received brochures, large and small envelopes and gummed address labels, in August of 1974. Because the labels were improperly gummed, he wrote and asked for correct labels which he subsequently received. Mr. Myhre testified that he mailed all 2,000 brochures, and about 300 were returned as undeliverable by the Post Office. He received no orders for any fur novelties.

JAMES GRAY testified that in November, 1974, he received an unsolicited brochure in the mail and decided to participate in the selling of fur novelties by mail. Accordingly, he mailed a check for $205.00 to Unique Ideas. When he obtained no response, he called the company several times and subsequently received two form letters stating that the materials had been shipped, although each letter gave a different shipping date. In March, 1975, the brochures to be sent to prospective customers arrived and Mr. Gray called and wrote the company complaining about the poor quality of the brochures. When the balance of his order arrived in April, 1975, he refused it. He stated he had not been reimbursed.

JERRY HUMMER, a laundry worker from Fort Wayne, Indiana, read advertisements in Specialty Salesman and Salesman's Opportunity magazines and ordered the $10.00 booklet on February 20, 1974. He ordered $325.00 worth of sales material from Unique. When the materials did not arrive within a month he called and wrote the company expressing his distress at the delay and requesting his money back. This request was denied by a form letter which stated that the materials had already been imprinted with his name and address. He complained to the Post Office and enlisted the aid of an attorney in getting a refund. In October, 1974, he received all of the materials and decided to mail them out. One thousand advertisements were mailed, approximately 200 were returned, and no orders were received.

JOHN LELAND PIERCE, an unemployed printer from Greenville, South Carolina, testified that he received two brochures in the mail from Unique Ideas in October, 1974, and ordered $340.00 worth of material. The order blanks arrived first, followed by the envelopes and mailing labels in early January, 1975. He sent out 5,000 advertisements and received one order for $39.00. Mr. Pierce testified to expenditures for renting a stamp machine and for the cost of the stamps.

The next witness, AL GUTZ, from Shelby, Nebraska, said

he received the brochure in the mail and ordered 2,000 advertisements and received no orders. He stated he spent $200.00 for postage. Mr. Gutz testified that he considered the brochure to contain a guarantee that he would receive $4,000.00 back from a mailing of 2,000 items.

YVAN FERRE, a French citizen living in Miami, Florida, testified he received the brochure in the mail and ordered $120.00 worth of material in early 1975. Although he received a confirmation that his order arrived and he called the company several times, he never received any materials nor did he obtain a refund.

CLARA C. CHAMBERS, of Ironia, New Jersey, saw and answered the advertisement in Modern Magazine. After reading the $10.00 brochure, she ordered 500 mailers for $63.00 in May, 1974. When her material did not arrive, she went to the company office in New York. She testified she was not allowed in the office and carried on all conversations through a window on the door. She was told that her materials would be sent to her. In two visits to the office, she saw four women at work, three "colored girls" and one "white girl" who "looked like" Mrs. Tucker. Her total order of materials arrived by mid-July but she never obtained any sales orders and many of her mailings were returned as undeliverable. When she wrote to the company expressing

her concern, the response was a form letter expressing disappointment over her lack of success.

PHILIP T. MacGOWN, a retired school teacher from Saginaw, Michigan, received the brochure in the mail and spent $115.00 for 1,000 mailers in November, 1974. He called and wrote the company when the materials had not come by December and received various letters stating that his order was being processed and filled. The total order arrived, parts in January and early February, and he sent out 800 advertisements. Although he got no orders, he stated his only complaint was that the company sent him 135 names too few.

FLOYD MYERS, from Kerrville, Texas, saw the advertisement in Salesman's Opportunity magazine and ordered the $10.00 brochure. After reading the brochure, Mr. Myers mailed a check for $73.00 to Unique for mailers. In December, 1974, he wrote questioning when his material would be delivered, and despite letters from the company that the merchandise would be shipped, he never received any mailing material. He testified that he sent a letter to the bank named in the advertisement questioning the validity of the company.

MORTIMER C. FAIRCHILD, from San Antonio, Texas, responded to an ad in True Story magazine and ordered the $10.00 brochure. He then wrote to Ernest Tucker suggesting that because of the

element of risk, Mr. Tucker should send him the materials for free and he would pay from the sales orders which he got. When he obtained no response, he mailed $63.00 on June 19, 1974. He received several letters from the company that the material was being shipped but, despite complaints by phone and mail, no materials ever were delivered, nor did he obtain a refund.

Suppliers

The government presented testimony from several witnesses who supplied Unique Ideas and Creative Giants with printed material, fur novelties and gummed labels:

LARRY CHAIT, the vice-president of Argo Envelope Co. of New York City, stated that in October of 1974, his company printed one and one half to two million envelopes for Unique. These envelopes, in two different sizes, were imprinted with different names, supplied by Unique, in batches of 500 or more. He testified that his first negotiations in regard to price were with Mrs. Tucker, and later he dealt with both defendants.

MARTIN SELVIN, a commercial printer using the firm name Accurate Web Printers, contracted with Creative Giants to print a four-page letter and a thirty-two page booklet describing the Ernest Tucker plan. He met with Mrs. Tucker on several occasions and spoke to Mr. Tucker on the telephone. The first order he received was for 400,000 letters and brochures. The

second order, placed in early 1975, was for two million letters and brochures, although he filled only one-half of the second order. Because of the quantity of paper and supplies he had to purchase, he requested an escrow arrangement be set up, and he went with Mrs. Tucker to the office of the attorney for Creative Giants. Selvin testified that he was paid about $130,000.00 in two checks, handed to him by Mrs. Tucker, but he was not certain who the maker of the checks was.

MARTIN BALAN, a printer, testified to printing two million letters and brochures for the Ernest Tucker method. Although the order was placed by Mrs. Tucker, he stated the check was signed by Ernest Tucker, and in working out an escrow arrangement with the attorney for Unique Ideas, he indicated his belief that he was dealing with Ernest Tucker as principal.

Mailing Services

LEE EPSTEIN of the John Blair Marketing Co., MICHAEL T. ABBENE of Schedule Mailings, and SEBASTIAN MANGINI of Jetson Mailing, all represented mail service firms which handled mailings for Unique and Creative Giants. These companies label, sort, insert and deliver mail to the post office for their customers. Mr. Epstein spoke with both defendants by telephone and received a purchase order signed by Gail Tucker. His company mailed 800,000 brochures for Unique. Mr. Abbene stated he spoke to

Ernest Tucker on the telephone and mailed about 1,400,000 brochures in November, 1974 and January, 1975. Sebastian Mangioni states his firm received a purchase order signed by Gail Ann Tucker in February, 1975 for one and one half million booklets to be mailed on behalf of Creative Giants. The order was never completed.

Furriers

LIBBYE NYMAN and SONIA SHABASON testified as furriers who supplied fur novelties to Unique Ideas and Creative Giants. Mrs. Nyman created mink and sable roses. She met Mr. Tucker in 1970 and Mrs. Tucker in 1972, and during that time and into 1973, she sold approximately 700 - 800 floral pieces to the Tuckers. Sonia Shabason stated that both Mr. & Mrs. Tucker purchased fur novelty items such as necklaces, pocketbooks, earrings, bracelets, key-chains and bow-ties from her father who is a furrier. Payment was received from both Mr. & Mrs. Tucker.

Employees

Three employees of Unique Ideas and Creative Giants testified for the government. ERNESTINE WASHINGTON worked for Unique from March, 1974 to January 1975. Her job was to supervise the proper packing of mailing materials to be sent to the agents.

She stated that she handled about 500 new orders per day consisting of supplies for 500 - 5,000 mailings. According to her, all employees acted under instructions from Mr. & Mrs. Tucker to pack orders promptly and correctly.

LILLY McCALL was employed by the Tuckers from 1971 to 1975. She stated that from 1974 to 1975 she worked as a packer and packed approximately 800 orders per day containing materials for 500 to 10,000 mailings. According to Ms. McCall, there were approximately thirty five employees of the firm, but she was the only one who sent out the mink flowers ordered by customers. She stated that she mailed approximately forty flowers per week from January, 1974 to April, 1975, although on cross-examination, she said sometimes as many as eighty in one day were shipped. On April 25, 1975, she took an inventory of the flowers and jewelry on hand and found 421 flowers and 227 pieces of jewelry in stock. Ms. McCall also testified that frequently orders were sent out in parts so that the number of mailings was not equivalent to the number of filled orders.

JANNIE McCALL worked for the company from late 1974 through October, 1975. It was her job to answer the complaint letters which were received. She handled only those letters asking for the $10.00 refund on the booklet and those inquiring about the non-receipt of their order. Form letters were sent, one

stating that a refund for the booklet would be sent when a copy of the check was received and the second stating when shipment was to be mailed. She answered between 25 and 50 complaints per day. She occasionally handled telephone complaints which numbered approximately 10 per day. She stated she took orders from Mary Lou Janini and Mrs. Tucker.

JACK GENSLER, a C.P.A., audited the accounts of the company's bookkeeper each month from 1972 to 1974. In November, 1973, Mrs. Tucker asked him to sign a statement that Ernest Tucker had earned $35,000.00 in one day and showed him deposit tickets to support the statement. He testified that before signing he insisted the word "earned" be changed to the word "grossed". It was also his testimony that the total earned was actually $42,000.00 in one day. As the C.P.A. for the firm, Mr. Gensler testified that the company stock was completely owned by Mr. Tucker.

EDMUND KINCKLE stated that he was in the mail order business and met with Mr. Tucker in 1971 or 1972 to get advice on how to make his own ads more profitable. Mr. Tucker gave him a number of suggestions which he successfully used in his own business. Mr. Tucker called and asked if Mr. Kinckle would give him a testimonial that he had been helpful to him in the mail order business and he agreed. He testified that when he

sent a letter saying that in using Ernest Tucker's money-making method he earned $2,000.00 in the first month he was referring to the mail order business in general.

Bankers

CHARLES HERSH, a banker with Chelsea National Bank, and ARTHUR J. McCLOSKEY, a banker for Manufacturer's Hanover Trust completed the government's presentation on direct. Each testified that Mr. Tucker had a company bank account with his bank. Mr. Hersh stated that the bank learned its name was being used in the advertisements and asked Mr. Tucker to discontinue doing so. Mr. Tucker agreed to desist. When the advertisements continued to appear, Mr. Tucker had a meeting with Mr. Hersh and the bank president. Mr. Tucker told them that no further ads would be printed, but those already printed would be used. An argument ensued and the bank closed the account in March, 1974.

Mr. McCloskey testified that his bank responded to inquiries about the company by asking Mr. Tucker to withdraw its name from the ad. Mr. Tucker stated the printing had already been mailed but the bank's name would be removed from future advertisements. Because the bank continued to get inquiries, the account was closed by them on January 31, 1975.

Post Office Investigators

On rebuttal the government presented two witnesses. JAMES STEPHENS, an inspector for the United States Postal Service, said he read the ad and wrote to Ernest Tucker requesting the name of the C.P.A. He received a reply containing the name of Jack Gensler, but did not receive an address or a copy of the statement.

CHRISTINE M. MACHO, a United States Postal Service inspector assigned to the Unique Ideas case, testified she recommended that all mail to the defendants be stopped on January 31, 1975, and a stop order was subsequently issued by the office of the General Counsel in Washington, D.C. She stated that it was not the practice to notify defendants in advance of stop orders although the post office usually notified companies when initial complaints were received so that they would have a chance to correct them.

Defense Evidence

The defense consisted of five witnesses, including both defendants who took the stand to testify on their own behalf. The crux of the defense of both Mr. and Mrs. Tucker was that the mail order business was a legitimate endeavor, that all of their advertisements were true statements, and all of their dealings with customers were carried out in good faith. Gail

Tucker, additionally contended that she played a subordinate role in the business owned and controlled by her husband and she was only an employee and an obedient wife.

GAIL ANN TUCKER. Mrs. Tucker took the stand first. She testified she was 28 years old, married to Ernest Tucker in 1969, the mother of two young children, and possessed of a 12th grade education. Mrs. Tucker stated that, at her husband's direction, she typed the statement and watched while Jack Gensler signed. She then took the statement to a Notary and attested to the fact that she had personally seen Jack Gensler sign the statement -- all this done at her husband's direction. Although she was listed as the secretary-treasurer of the corporation, she never was allowed to sign any checks, had no authority, owned no stock, and worked as her husband's employee. Her understanding of the Ernest Tucker plan was that it was a mail order method and was not limited to the selling of fur novelties. She testified that all those who requested refunds for the brochures were mailed refunds and presented in evidence approximately $50,000.00 worth of refund checks mailed between January, 1974 and May, 1975. Mrs. Tucker testified she had no prior experience in the mail order business and thus relied on her husband's knowledge. In explanation of the delay in filling orders, Mrs. Tucker stated that much of the delay was

caused by the suppliers, especially the printers who were always behind on orders. All orders were filled in time periods ranging from three weeks to three months. Names were purchased from four companies and Mr. Tucker made the selections of the lists and handled the purchases. The lists were delivered already affixed to gummed tape labels ready for the agents to attach to the envelopes and mail. Mrs. Tucker said she knew that Ed Kinckle was not an agent of her husband and that he did earn money using her husband's mail order method. One of her jobs was to package the mink and sable roses and she said that about 400 were sold. Mrs. Tucker insisted she was not a writer, had nothing to do with the writing of the booklet mailed out and could not answer questions about the booklet. She also stated that she handled the complaints that were received and on about twenty occasions refunded money to people who did not get the mailing material.

MARIE LAURENCE JANINI, also known as Marie Law, testified she was an employee of Unique Ideas. She stated that Mrs. Tucker was subordinate to Mr. Tucker who was the boss, and Mrs. Tucker took orders from him. Her orders were to see that materials were mailed out promptly. She also handled complaints about unfilled orders. When a complaint was received she would check to see if the order had been shipped and would send a

form letter indicating the expected date of shipment.

WILLIAM HECHT and PHILIP BOEHM supplied lists to Unique Ideas and Creative Giants. Mr. Hecht, on behalf of Active Mail Order Corp., sold lists to Mr. Tucker of women who were interested in jewelry and accessories and purchases of quality home decorating items. He stated that his company believed these lists to be of people who are buyers. Each list has an expected 1 - 2% bad addresses; additional returns, according to Mr. Hecht, can be expected from computer and mailing service error. Mr. Boehm, vice-president of Dependable List, Inc., dealt with Ernest Tucker on the sale of about three million names. Two types of lists were purchased by Mr. Tucker - lists of "opportunity seekers" and lists of potential buyers. Mr. Boehm stated that "nixies" (bad names and addresses) compose about 10% of the lists, but the lists rented to Mr. Tucker were cleaned on a regular basis.

ERNEST TUCKER. Ernest Tucker, the last witness presented by the defense, took the stand to testify on his own behalf. The cornerstone of Mr. Tucker's defense was his lack of any intent to defraud. He steadfastly maintained he was a legitimate business-man, operating a legitimate business in the same location for ten years. The $10.00 booklet, Mr. Tucker stated, was like a prospectus and anyone who was not interested in part-

icipating in his plan was refunded his money plus postage. It was Mr. Tucker's testimony that all of his employees were instructed to deliver materials on time and any delays were caused by suppliers. Mr. Tucker denied that any statements in his booklet were false or intentionally misleading. The booklet was a simple presentation of his money-making method, the use of mail order to sell various products to selected customers. As a business-man he supplied his agents with lists purchased from reputable dealers, with mailing materials printed to order, and with a product which he believed would sell. He based his belief on the success of a pre-mailing test and he expected his agents to be just as successful. Mr. Tucker denied the prosecution's attempt to characterize his booklet as fraudulent. Mr. Tucker stated he had earned $35,000.00 in one day, the accountant had signed the statement, the roses did sell and the money-making method was the total concept, not just the sale of roses. Additionally, Mr. Tucker stated that Mrs. Nyman was not his only supplier of flowers and Mr. Tucker pointed to the fact that the government had stopped his mail, thus prohibiting him from knowing how many additional orders were placed.

On surrebuttal, Mr. Tucker stated that his employees were instructed to give the name of the C.P.A. to anyone who requested it, as well as a copy of the affivavit if it was requested.

ARGUMENT

I.

THE FAILURE OF THE TRIAL JUDGE TO RECUSE HIMSELF FROM HEARING THE CASE IS VIOLATIVE OF 28 USC §455, CONSTITUTES AN ABUSE OF JUDICIAL DISCRETION AND DEMANDS REMAND FOR A NEW TRIAL BEFORE A DIFFERENT JUDGE.

On November 1, the Honorable Robert J. Ward met with attorneys Chance for the defense and Cutner for the prosecution in a pre-trial conference. The judge revealed a belief in the defendants' guilt by expressing surprise that the case was going to trial. He stated that he was familiar with the case, had read Ernest Tucker's rap sheet, and heard and saw some of the witnesses in the prior civil case:

> "THE COURT: I don't think it should take long. You know, I conducted a hearing in this case, and probably heard and saw some of the same witnesses. In fact, I'm curious about the defendants going to trial.
>
> I note two things: I note the record which was compiled at the prior hearing when Mr. Chance was not present, and I do have some awareness of the defendant's prior involvement with the law which, unfortunately for him, take up the better part of three pages of an FBI sheet, and I must suggest that if he wishes to go to trial that is his right, but I did hear some of the evidence in this case already from the victims."

Interestingly, he referred to the testimony of the "victims," revealing clearly his feelings as to the defendants' built [Transcript, Pre-trial conference Nov. 1, 1976, pp 7-8].

Defense counsel Chance, at that time representing both defendants, immediately requested that Judge Ward recuse himself. The judge denied the motion on claimed 28 U.S.C. §144 grounds, stating it was too late to file an affidavit and motion. He

also, despite his earlier comments, denied having any preconceived notions as to the guilt of the defendants [Transcript, Pre-trial conference, Nov. 1, 1976 pp 7-9].

Federal law on recusal is governed by two statutes, 28 U.S.C. §144 and now 28 U.S.C. §455. The earlier statute, §144, required the filing of a written motion supported by an affidavit signed by the defendant attesting to the personal bias of the judge against him. Numerous cases have held that the motion and affidavit should establish four aspects of bias: 1) The bias must exist in fact, innuendos are insufficient to meet the test; 2) The bias must be directed at the party-defendant, not at his attorney or the issues of the case; 3) The bias must be personal and not aimed at an entire class; 4) The bias must be extra-judicial in origin, thus not developed during the course of the pending litigation. Lazafsky v. Sommerset Bus Co., Inc., 389 F. Supp. 1041 (E.D.N.Y. 1975); United States v. Grinnell Corp., 384 U.S. 563 (1966), United States v. Schlafani, 487 F.2d 245 (2d Cir. 1973).

On December 5, 1974, 28 U.S.C. §455 was enacted into federal law. The relevant portion of the statute is as follows:

> (a) Any justice, judge, magistrate, shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of evidentiary facts concerning the proceeding; ....

This new statute directs a new attitude toward recusal of federal judges -- one fully responsive to the ideal that "... justice must satisfy the appearance of justice." See Offutt v. United States, 348 U.S. 11, 14 (1954) (Frankfurter, J.).

--Section 455, as amended, worked a "drastic change"--

According to the House Judiciary Committee Report No. 93-1453, pp. 1 and 5, Public Act 93-512 was intended (1) "to broaden and clarify the grounds for judicial disqualification;" (2) to create an objective rather than a subjective standard for determining a judge's qualification to sit; and (3) to remove the "duty to sit" concept previously used to resolve doubts in favor of a judge's continuing to preside in a particular case. 1974 U.S. Cong. & Adm. News at 6351 and 6355. The requirement that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. §455(a), thus "... makes a drastic change in procedure in the federal courts." 13 Wright, Miller & Cooper, Federal Practice and Procedure §3549 (1975). That work was cited in Samuel v. University of Pittsburgh, 395 F. Supp. 1275, 1277 (W.D Pa. 1975) where the court held that the 1974 amendment "changes the original Section 455 by liberalizing the disqualification procedure to favor the moving party..."

--Remedial statute entitled to liberal construction--

> A remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, and generally is to be liberally construed.
>
> 28 C.J.S. "Statutes," §388 at p. 918.

Examples of remedial legislation include the Federal Securities Acts, Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); long arm statutes, McGee v. International Life Insurance Co., 335 U.S. 220 (1957), Bagsarian v. Parker Metal Company, 282 F. Supp. 766, 769 (N.D. Ohio 1968); and statutes relating to the disqualification of judges, Application of Capuano, 327 N.Y.S. 2d 17, 68 Misc. 2d 481 (N.Y. Co. Ct. 1971), People ex rel. Union Bag and Paper Co. v. Gilbert, 256 N.Y.S. 442, 143 Misc. 287, aff'd, 260 N.Y.S. 939, 236 App. 873 (Sup. Ct. 1932). According to the House Committee on the Judiciary, the purpose of the 1974 amendment was "to improve judicial machinery..." which sounds as "remedial" as one can get. And, remedial legislation is "entitled to a broad interpretation so that its public purposes may be fully effectuated." Binkley Mining Co. v. Wheeler, 133 F.2d 863, 871 (8th Cir. 1943).

--The appearance of impartiality test--

Under the new standard adopted in amended §455, an objective reasonable-man test is to be applied in determining a judge's qualifications to preside -- i.e., if there are facts which might lead a reasonable man to question the court's impartiality, he is not qualified. Committee Report, supra

p. 5. In Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) the Court overruled the decision of a panel of arbitrators, one of whom had an undisclosed interest in one of the parties, even though no actual bias had been shown:

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.
>
> 393 U.S. at 150.

According to Professor Frank, in his testimony before the Senate Judiciary Committee, that standard is now part of §455(a). Hearings on S.1064 before the Subcommittee on Improvements to Judicial Machinery of the Senate Committee on the Judiciary, 93 Cong. 1st Sess. at 114 (1973).

--Judge Ward's impartiality was reasonably questioned--

In the instant case, it appears from the pre-trial conference that the judge had already decided upon the guilt of the defendants. This pre-judging of guilt came not from weighing the evidence in the case before him, from hearing the testimony, considering arguments and applying the law, but from conclusions drawn from an earlier civil suit involving the same defendant. In the words of the judge, he had already spoken to some of the "victims." (Trans. p. 7, Nov. 1, 1976).

The words and the legislative history of §455 are clear. Recusal is mandated where the judge finds himself "in any proceeding in which his impartiality might reasonably be questioned." How can a judge who apparently has already decided upon the guilt of the defendants, who has expressed his surprise that the defendants are bothering to go to trial, and who refers to prosecution witnesses as "victims" not give occasion to reasonable questions about his impartiality?

The problem is not that Judge Ward presided over the prior civil case. It is not just that he formed adverse opinions as a consequence. Rather, we confront a peculiar, critical problem here because the judge evidently could not restrain his opinions, allowed voice to his conclusions, thus filled the public record with the appearance of partiality -- and supplied a reasonable factual basis for recusal. We, of course, refer to his pre-trial statement but note also that such is repeated and confirmed during the course of the trial (see argument Point II). Thus, neither the litigants nor the public could have full assurance of the integrity of the judicial process. This is essential --and this is precisely what amended §455 is supposed to guarantee. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested

as well as be so in fact." Public Utilities Comm'n. v. Pollak, 343 U.S. 451, 467 (1952) (Frankfurter, J.).

In conclusion, the judgment below should be reversed because Judge Ward abused his discretion by not recusing himself and by ruling on the question under the old standards of 28 U.S.C. §144 rather than under the liberal remedial standards of amended 28 U.S.C. §455.*

*Judge Ward's contention that the defense motion had to be denied because it was untimely made and in improper form demonstrates rigid adherence to §144 requirements. Section 455 rejected these rigidities. See 1974 U.S. Code Cong. & Adm. News 6351, 6358. It was meant to be self-enforcing by the presiding judge (as well subject to judicial review and appeal).

II.

THE PRESIDING JUDGE'S PRE-DETERMINATION OF GUILT INFLUENCED HIS CONDUCT OF THE TRIAL, CONFIRMING THE EXISTENCE OF PARTIALITY AS WELL AS REQUIRING REVERSAL UNDER THE DUE PROCESS CLAUSE AND UNDER THE COURT'S SUPERVISORY POWER.

Those courts which --under the standards of 28 U.S.C. §144-- have not found bias mandating recusal and thus remand for a new trial, have used as a secondary test for bias, the existence of prejudice in the conduct of the trial. E.g., Voltman v. United Fruit Co., 147 F. 2d 514 (2d Cir. 1945); Winters v. Travia, 495 F. 2d 839 (2d Cir. 1974); Wolfson v. Palmieri, 396 F. 2d 121 (2d Cir. 1968). Assuming arguendo that recusal grounds under amended 28 U.S.C. §455 were not established by the presiding judge's own initial remarks noted in the previous argument, then it may indeed be appropriate to take a look at the trial itself. In Wolfson v. Palmieri, supra, the same judge presided at two different cases involving the same defendant and similar crimes. The court stated, 396 F. 2d at 126:

> "...There should be a presumption that the trial court will conduct an errorless trial; that with skilled trial counsel in the case he will avoid participation in the examination of witnesses except in the interests of clarity; that he will not by demeanor indicate any personal or hostile attitude toward the witnesses or the case; that he will state fairly the issues in his charge.

Evidence that contradicts the above presumption of judicial impartiality bolsters and gives credence to the existence of

bias and requires a new trial in accordance with the Fifth and Sixth amendments and in furtherance of the civilized administration of criminal justice.

(A) The Failure To Grant A Continuance To Trial Counsel Retained Two Weeks Before The Trial Was An Abuse Of Discretion And An Indication Of Bias.

On November 23, 1976, the attorney for Gail Ann Tucker appeared before Judge Ward and made a formal motion for a continuance. Mr. Richardson was retained by Mrs. Tucker at the insistence of the judge that the defendants be represented by separate counsel because of a possible conflict of defenses. (Pre-trial conference of November 1, 1976, p. 10). He filed a notice of appearance on November 12, 1976 and, although assuring the judge that he would make every effort to be ready for trial on November 29, 1976, reserved the right to ask for continuance if the time proved inadequate. In support of this motion, Mr. Richardson cited the voluminous material (more than 23 stacks of papers) which had been turned over to him by the attorney for Mr. Tucker and the government; the legal questions which he had not had adequate time to research such as the husband-wife relationship and its effect on criminal liability; the existence of witnesses whom he had not been able to interview. (Pre-trial conference of November 23, 1976, p. 3-4). Mr. Chance, attorney for Ernest Tucker, joined in the motion and added as grounds the need to investigate and

obtain material in the hands of the carriers pertaining to counts four and five (he mistakenly stated three and four in the record) of the indictment. Judge Ward denied the continuance. After the prosecution rested, the attorneys for the defense again moved for a continuance before presenting their case. The motions were denied (Tr. 585)

The words of Judge Ward make it clear that he had no intention of allowing any delay in the trial. Even before the trial date was set, the attorney for the defense asked for as late a trial date as possible within the confines of the Speedy Trial provisions. The prosecutor indicated that the trial must start no later than January 1, 1977 and that this date would be suitable to him. The judge's answer to the defense's request was "I will put it down for the earliest date I can schedule it" (November 1, 1976 pre-trial conference, p. 7). Again, on November 10, 15 and 23, the court denied all requests for a continuance.

The right to a continuance, of course, is not absolute. Arbitrariness in denying a continuance, however, constitutes an abuse of discretion and denies due process and other trial rights. United States v. Rosenthal, 470 F. 2d 837 (2d Cir. 1972); Gavino v. McMahon, 499 F. 2d 1191 (2d Cir. 1974); United States v. Wheeler, 434 F. 2d 1195 (9th Cir. 1970). See also, Clinton, The Right to Present a Defense: An Emergent

Constitutional Guarantee in Criminal Trials, 9 Indiana L. Rev. 711, 850-52 (1976).

In determining whether a continuance should be granted, courts have looked to such factors as good faith of the defense and the amount of time the defendant has been incarcerated awaiting trial. United States v. Maxey, 498 F.2d 474 (2d Cir. 1974).

The Court, the public and the defense, of course, have an interest in the unclogging of court dockets and the expeditious attention to questions which affect the future of each individual brought before the bar of justice.

> "[H]owever, speedy trial rules were intended to promote disposition of criminal charges with 'reasonable dispatch,' uninhibited by delays for which there is no good reason. They were never designed to permit a district court to ride roughshod over the right of a defendant to prepare for trial. Indeed they were aimed principally at prosecutorial delay...." (Citation omitted).
>
> Gavino v. McMahon, 499 F.2d 1191, 1196 (2d Cir. 1974).

Time and again, the Courts have stated that the emphasis on speed should not outweigh the emphasis on justice --and justice can only poorly be served by an attorney who has had inadequate time to prepare a defense for his client. Gavino v. McMahon, supra; United States v. Wheeler, 434 F.2d 1195 (9th Cir. 1970); Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973); Gadsden v. United States, 223 F.2d 627; 96 U.S. App. D.C. 162 (1955), cert. denied, 350 U.S. 949.

Whether or not the failure to grant a continuance constitutes such abuse of discretion as to require a new trial depends upon the circumstances of each case. United States v. Rosenthal, 470 F. 2d 837 (2d Cir. 1972); Unger v. Sarafite, 376 U.S. 575,589 (1964); United States v. Inman, 483 F. 2d 738 (4th Cir. 1973). In Gavino, supra the Indictment was filed in April, 1974, the defendant was arraigned in May, 1974 and trial was set for June 17. On June 7 the judge denied a motion for a new trial date despite the fact that defendant's counsel was engaged in a two-week murder trial, voluminous discovery materials had been turned over to the defense on June 3, numerous witnesses needed to be interviewed, and the prosecution had no objection to a continuance. On appeal, it was held that the court abused its discretion in denying a continuance. Likewise, in Stans v. Gagliardi, supra, the court, while refusing to rule because an order setting a trial date is not appealable as a final order, nevertheless urged the judge to consider "the risk that overruling such a claim [of a need for a short delay] may undermine a conviction obtained after many weeks of trial." 485 F. 2d at 1291. In Stans, discovery materials were turned over to the defense only 13 days prior to trial, the attorney argued he needed time to review the materials, to interview witnesses and to prepare a defense. United States v. Uptain, 531 F. 2d 1281 (5th Cir.

1976) contains an exhaustive survey of Fifth Circuit rulings on factors to be considered in granting continuances. Relevant considerations are the amount of preparation time, the likelihood of prejudice, the defendant's failure to expedite the preparation, the complexity of the case, the availability of discovery, the adequacy of the defense presented, the experience of the attorney, length of the attorney-client relationship and representation by other counsel which benefits new counsel. 531 F. 2d at 1286.

Bearing these factors in mind, there is much to the contention that the failure to grant a continuance as requested by both attorneys for the defense was an abuse of judicial discretion. The amount of time requested was minimal --at most four weeks. The attorney for Gail Tucker had only two weeks before trial started to prepare a defense. While it is true that he benefited to some extent from the preparation of Mr. Chance, there were avenues of defense which Mr. Chance had not explored, which potentially conflicted with the interests of Mr. Tucker, and which Mr. Richardson could not investigate because of the lack of time. Both attorneys moved for a continuance to subpoena witnesses and records they considered vital to the defense. The witnesses and records cited would help to establish the good faith of the defendants in mailing out materials to their agents. The Court ruled such

evidence would only be cumulative since the defendants and their employees had already testified to good faith. Yet, paragraphs four and five of the indictment focused on one aspect of the scheme being deliberate delay and the prosecution introduced at least seven witnesses and numerous exhibits to establish delay as an element of the scheme to defraud. Certainly it is arguable that the jury would have been favorably swayed more by post office and carrier records indicating mailings, than by the unsupported testimony of the defendants and their employees. If the defense had been allowed to refute this one aspect of the scheme, the jury might have been convinced of the lack of fraudulent intent throughout. Judge Ward's failure to grant a continuance to allow counsel --expecially counsel retained two weeks before trial-- time to prepare adequately for trial constituted on abuse of discretion requiring reversal.

Even if the failure to grant a continuance was not such an abuse as to mandate reversal, it is a weighty consideration when combined with other factors. See United States v. Wheeler, 434 F. 2d 1195 (9th Cir. 1970). It is worth questioning whether the trial court's failure to grant a continuance was based on an impartial analysis of the situation or on his pre-determination that the defendants were guilty and therefore were not entitled to otherwise reasonable delay. Consider the court's emphasis on picking

the earliest trial date possible. Consider the somewhat shocking colloquy where the judge informs Mr. Richardson that the prosecution goes first, thus giving the defense more time to prepare. Certainly an experienced trial judge is aware of the crucial importance of adequate preparation for cross-examination. If a defense begins only at that moment when the defense's case is called, it is unlikely that any real defense will be presented.

(B) The Failure To Grant A Continuance So The Defendant, Ernest Tucker, Could Retain Counsel Of Choice Was An Abuse Of Discretion And An Indication Of Bias.

Still another reason the court should have considered in deciding upon the motion for a continuance is the right to counsel of choice. At the pre-trial conference held on November 23, 1976 and during the course of the trial (Tr. 850-855), Mr. Tucker indicated strong dissatisfaction with his attorney and his approach to the defense of the case. Noting the conflicts between Mr. Tucker and his counsel, the judge gave the defendant three choices: 1) retain new counsel; 2) act as his own attorney; 3) retain Mr. Chance (Trans. November 23, pp. 24-25). These choices were in actuality no choice at all, since the court made it clear that no matter what decision, no delay would be granted to the new counsel.

The right to counsel in serious criminal matters is well established as one of the basic tenets of due process as

guaranteed by the Sixth and Fourteenth amendments. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972). The right to counsel, comprehends the right to retained counsel of one's own choice and a reasonable opportunity to obtain their representation. Chandler v. Fretag, 348 U.S. 3 (1955); United States v. Bragan, 499 F. 2d 1376 (4th Cir. 1974); United States v. Sheiner, 410 F. 2d 337, 342 (2d Cir. 1969). See also, Davis v. State, 292 Ala. 210, 291 So. 2d 34 (1974). Judge Winter in his dissent in Bragan, 499 F. 2d at 1381, expressed his strong feeling that the effectiveness of the attorney is not the issue; the real question is whether he is counsel of choice and if he is not, then due process has not been granted. (Citing Davis v. State with approval). Other courts have viewed the failure to grant a continuance to obtain counsel of choice as a factor to be weighed in assessing the overall fairness of the trial. United States v. Maxey, 498 F. 2d 474 (2d Cir. 1974); United States v. Bragan, 499 F. 2d 1376 (4th Cir. 1974); United States v. Uptain, 531 F. 2d 1281 (5th Cir. 1976)*.

In the instant case, the defendant, Ernest Tucker, expressed clear dissatisfaction with his attorney before the trial. The Judge insisted on treating this strong conflict as a trivial

*Defendants-appellants specifically ask this Court to adopt Judge Winter's view and to overrule any contrary Second Circuit authority, if necessary.

matter, brought up only for purposes of delay, and refused to give any serious consideration to the sheer impossibility of preparing an adequate defense when the attorney and his client are unable to work together. One can only question what harm a continuance would have done, especially when weighed against the important right being denied the defendant. And, again, we fear that the failure to grant a continuance was predicated on the judge's pre-determination of the defendant's guilt, thus in his mind nullifying any need for the defendant to find an attorney who would represent him as he wished.

(C) The Extensive Involvement of the Judge in Cross-examination and Questioning of Witnesses was Prejudicial Error Requiring Reversal.

During the course of the trial, Judge Ward became extensively involved in the questioning of witnesses. Not counting the routine organizational type questions necessary for the conduct of a trial, the judge asked over 530 questions of the witnesses and defendants. (See Addendum for a complete list). At times, the judge became so involved in the questioning that it became difficult to separate him from the prosecution. He asked 81 questions of Jannie McCall, 46 of Arthur J. McClosky, 39 of Martin Selvin. Many of his questions were simply to clarify a statement; but many of his questions were an effective presentation of the elements of the prosecution's case. For example, it was the judge who asked many of the

witnesses who testified as to their participation as an agent-mail handler, what method they used of communicating with the defendants, thus aiding the prosecution in establishing the use of the mail, an essential element of their case. (Tr. 134, 174-175, 207, 292).

By the time Ernest Tucker took the stand, the judge was actively participating in the cross examination. In addition to the 50 questions asked of Mr. Tucker, Judge Ward's comments and conduct reflected his impatience with the witness, his disbelief in his veracity, and his eagerness to terminate the trial.

In the presence of the jury, the judge stated to the defendant, Ernest Tucker:

The Court: "...I suggest that, the jurors being reasonable men and women who have taken their good judgment and common sense and brought it with them to the courthouse, I think they are just as well equipped to read this book as anybody's and if you want to explain something, Mr. Tucker, you go right ahead.

The Witness: Okay.

The Court: You say you are supposed to... I want to hear his explanation -- you say the fellow reading the book, he starts at the front and continues to read. He gets to page 10. Is that right?

The Witness: Yes, sir.

The Court: Now, he gets to page 10. You say to understand what it says on page 10, you have to flip back. All right, you have to flip back, all right. Where do you flip back to?

The Witness: What I'am saying, if I mention my money-making method on page 10 here, and I have described it on page 7, then when you read page 10, if you don't -- if you haven't read previously what my method is, there can be some confusion.

The Court: Taking the first nine pages, where is it where you describe what you call on the very first page, "My proven easy money method"? Where do you describe it in pages 1 through 9? Just show the jury and the Court."

(Tr. 786)

These are not questions of an impartial judge merely clarifying a point for the record. This is active, somewhat hostile questioning, almost defying the defendant to prove his veracity and certainly revealing the judge's partiality to the jury. (It should be noted that in conference out of the presence of the jury, Mr. Tucker strenuously objected to the bias he felt the judge exhibited by the above questions and staments. (Tr. pp. 865-868)).

Earlier the judge jumped into the questioning by Mr. Richardson to ask various questions about advertising of other items in the brochure, again assisting the prosecution in establishing its case (Tr. 793-94). Although made out of the presence of the jury, the exchange between Mr. Tucker and Judge Ward is revealing of the judge's view of the defendant. He accuses Mr. Tucker of scheming to delay the trial, of being aware of his own guilt and of doing anything to avoid the

verdict. (Tr. 854-56). From here on the record is replete with examples of the judge's impatience to get the trial over with. He continually urges speed, and begins to cut off the defendant's answers and in some instances to answer for him (e.g. Tr. 930-31, 938). Losing his air of judicial impartiality completely, the court retorts to a remark made by the defendant "No, there is only one person around here who is not being wise, and I'm going to leave it to your imagination to determine who is who " (Tr. 933). When the defendant starts to answer a question, the judge states: "No, I know what your explanation is. We have heard it three times." (Tr. 933). Later, Mr. Tucker explained that the advertisement did not state the accountant's statement was signed in front of a notary. The judge interrupts: "I want to hear that answer again. I want to hear it read, and I want the jury to have this accountant's statement in front of them when they hear it." The prosecutor immediately indicates he will be happy to comply. (Tr. 943). Again the judge is assisting the prosecution and even without hearing the tone of the judge as he makes the above statement, his evident disbelief of the defendant is obvious.

At page 945, the Court again takes over the questioning of the defendant with questions tending not to clarify but to assist the prosecution in establishing guilt. When Mr. Tucker

said he sent copies of the accountant's affidavit to those who asked for it, the Court defies him with: "Name one. Name one person to whom you sent that Gensler statement that's signed by your wife?" Again, at page 948, the Court demands: "You just name one investor, one of the people who sent in money to your firm to whom you sent this original document which was signed by your wife. Just name one." When Mr. Tucker objects that the question is unfair, the judge proceeds to ask if three more times before withdrawing it.

At page 970, the Court is again questioning the witness. When his answers are not specific enough, the judge impatiently states, "You can't stop, can you?" On pages 975-976 the judge and the defendant, in the presence of the jury, get into an argument over whether or not the defendant is intimidated. When Mr. Chance questions his client on re-direct, the judge in a lengthy exchange interrupts the questioning to lecture the attorney on asking a proper questions and acting like a lawyer. (Tr. 984). Again, the judge explodes completely, out of the presence of the jury. (Tr. 990). After a heated exchange in which the defendant insists on his innocence, Judge Ward emphatically replies: "I wouldn't take a plea of guilty from you... if it was your last breath." (Tr. 990). These are not the words of an impartial judge.

It has long been established that the role of a judge in the Federal court system is not that of a 'mere moderator';

he may "elicit testimony from witnesses, comment on the evidence to the jury, and limit the questioning of counsel." United States v. Hill, 496 F2d 201 (5th Cir. 1974). United States v. Marzano, 149 F.2d 923 (2d Cir. 1945). The judge may ask questions which will assist the jury in understanding the evidence as long as he is careful to preserve an attitude of impartiality. United States v. Natale, 526 F2d 1167, 1169 (2d Cir. 1975); United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975); United States v. Boatner, 478 F.2d 737, 740 (2d Cir. 1973), cert. denied, 414 U.S. 818 (1973); United States v. Pellegrino, 470 F. 2d 1205, 1206-07 (2d Cir. 1972) cert. denied, 411 U.S. 918 (1973); United States v. Cheramie, 520 F. 2d 325 (5th Cir. 1975). As this Court stated, however, the judge must guard carefully against the appearance of partiality:

> "But he nonetheless must remain the judge, impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. Because of his power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence. United States v. Minuse, 2 Cir., 114 F.2d 36; Martucci v. Brooklyn Children's Aid Soc., 2 Cir., 140 F.2d 732; United States v. Marzano, 2 Cir., 149 F.2d 923."
>
> United States v. Brandt, 196 F.2d 653,654 (2d Cir. 1952).

Where the judge merely asks questions designed to clarify issues presented by the prosecution, United States v. Natale, supra; United States v. Cheramie, 520 F.2d 325 (5th Cir. 1975); United States v. Arroyave, 477 F.2d 157 (5th Cir. 1973); United States v. Jacquillon, 469 F.2d 380 (5th Cir. 1972); Singer v. United States, 326 F.2d 132 (9th Cir. 1964); where he maintains an attitude of impartiality in his questioning and makes it clear to the jury that they are the final arbiters of all questions of fact and are not bound by his comments or questions, United States v. Jacquillon, supra; where any bias is exhibited out of the presence of the jury, United States v. Schafani, 487 F.2d 245 (2d Cir. 1973); United States v. Arroyave, supra; and where the judge's comments are directed to the attorney, not the defendant, and the judge so indicated by his statement to the jury, Bush v. United States, 267 F.2d 483 (9th Cir. 1959) the courts have held the bias was not adequate to mandate reversal. It is where the cumulative effect of the questioning, of the comments to the witnesses and of the judicial demeanor reach the point of possibly conveying to the jury the judge's alignment with the prosecution or pre-determination of the defendant's guilt that he oversteps the bounds of permissible participation and necessitates reversal and remand for a new trial. United States v. Cuevas, 510 F.2d 848-850 (2d Cir. 1975).

In United States v. Brandt, supra, the court held that the cumulative effect of 900 questions asked by the court during the course of an 8-day trial, the nature of many of the questions, the active cross-examination by the judge, and the tone of many of his remarks all combined to deprive the defendant of a fair trial and thus require reversal. In United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973), the judge participated unnecessarily in the cross-examination of several defense witnesses and asked such extensive questions during the prosecution's case that at one point before beginning to question a witness, the prosecution asked if the judge would like to begin the questioning. Additionally, and perhaps of controlling weight, was the questioning of one of the defense witnesses in which the judge's questions and remarks strongly indicated his disbelief of the witness. Such conduct by a trial judge departs from the role of impartiality a judge must play and requires reversal for a fair trial in accord with the demands of due process. See also Williams v. United States, 98 F.2d 685 (9th Cir. 1937) (extensive questioning in the nature of cross-examination and unnecessary sarcasm tending to belittle the defense); Anderson v. Great Lakes Dredge & Dock Co., 509 F.2d 1119 (2d Cir. 1974) (extensive questioning of witnesses demonstrating hostility towards defense).

While the judge may participate, "he should always be calmly judicial, dispassionate, and impartial." Williams v. United States, 93 F.2d 685-691 (9th Cir. 1937).

Improper judicial interference is not cured by a charge to the jury that they should disregard his remarks as they are the final determiner of the facts. Williams v. United States, supra, at 693; cf. United States v. Jacquillon, supra.

In the instant case the judge participated extensively in the questioning of the witnesses, cross-examined the defendant, Ernest Tucker, and the defense witnesses, denigrated the defendants and their attorneys with sarcasm, prejudicial statements and rulings and so thoroughly participated as a member of a prosecution team as to abandon his role of judge and forsake the "calm impartiality" required in a fair trial.

Again, we add in support of argument Point I, the judge was convinced of the defendants' guilt before the trial started, he allowed his belief to color his actions and he thus insured the conviction of the defendants. Points I and II, separately or combined, require reversal and remand for a new trial before a different judge.

III.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY CONCERNING AN ESSENTIAL ELEMENT OF AIDING AND ABETTING: CRIMINAL INTENT.

In charging the jury, Judge Ward charged on aiding and abetting as follows (Tr. 1146):

> "I turn now to aiding and abetting, a subject which I said I would return to later in my charge. It is not necessary for the government to show that a defendant physically committed the crime himself or herself. You will recall that Section 2 of Title 18, United States Code, which I read to you, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.
>
> Accordingly, you may find either defendant guilty of the offenses charged if you find that beyond a reasonable doubt that one defendant committed the offense and that the other defendant aided and abetted that defendant.
>
> To determine whether a defendant aided and abetted the commission of an offense, you ask yourself these questions: Did he or she associate himself or herself with the venture? Did he or she participate in it as something he or she wished to bring about? Did he or she seek by his or her action to make it succeed?
>
> If the defendant you are considering did this, then that defendant is an aider and abettor."

Defense counsel excepted to this charge specifically pointing out the Court's omission to instruct the jury concerning intent to aid and abet and specificaly noting the requirement that aiding and abetting be done "knowledgeably" and be "willful" (Tr. 1146). The Court reviewed its charge and overrruled the exception (Id.).

The standard charge on aiding and abetting is contained in Devitt & Blackmar, Federal Jury Practice & Instructions §12.03 at 327 (1977 edition) as follows:

"In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.

An act or omission is "wilfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

You of course may not find any defendant guilty unless you find beyond reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission."

Crucial to the crime of aiding and abetting is the element of intent to bring about a criminal act. United States v. Hernandez, 290 F. 2d 86 (2d Cir. 1961); Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960); United States v. Peoni, 100 F. 2d 401 (2d Cir. 1938); United States v. Barfield, 447 F. 2d 85 (5th Cir. 1971); United States v. Barber, 429 F. 2d 1394 (3rd Cir. 1970). In United States v. Newman, 490 F. 2d 139 (3rd Cir. 1973), the judge charged substantially the same as the judge in the instant case. The government unsuccessfully contended that the use of the word "participate" in the charge was indicative of criminal intent to satisfy the requirement of a charge on mens rea. The appellate court disagreed and reversed stating that wilfulness must specifically be charged in relation to aiding and abetting, not only in relation to the crime itself.

See also, United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973).

Since much of the government's case against the defendant Gail Tucker was aimed at her participation as an aider and abettor, failure to charge on the crucial element of intent, could have led the jury to conclude that criminal intent to commit a crime was not essential and therefore to convict Gail Tucker for mere assistance and participation in the mail order business of her husband. This is especially true since the jury's verdict in no way indicated whether Gail Tucker was found guilty as a principal or as one who aided and abetted.

Both defendants were entitled to have their fates decided by a properly instructed jury and, therefore, their convictions should be reversed for a new trial.

CONCLUSION

Prior to the commencement of the trial, the judge indicated his belief in the guilt of the defendant. Denying a motion to recuse himself because of bias was prejudicial error. The error was compounded by the prejudicial rulings and actions which permeated the trial. The judge's refusal to grant a reasonable request for a continuance on behalf of Gail Tucker, to allow the defendant Ernest Tucker a chance to find an attorney of his choice, and to charge on intent as an essential element of aiding and abetting and his active participation in the prosecutorial aspects of the case, his sarcastic and belittling comments to the defendants and their attorneys and his active questioning of the witnesses, all contributed to an atmosphere inconsistent with the impartial administration of justice. The defendants were allowed their day in court, but they were totally denied the due process protection that makes that day meaningful.

For the above stated reasons, the judgment below should be reversed and the case remanded for a new trial.

Respectfully submitted,

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June 12, 1977

ADDENDUM

INTERROGATION BY THE TRIAL JUDGE

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	689	4
	690	6
	691	3
	693	1
	694	1
Hecht	703	3
	704	1
	707	2
Hecht	708	1
(Cont.)	709	1
	710	2
	711	4
	712	1
	713	3
	714	1
	716	2
Janini	727	2
	728	1
Boehm	735	2
	736	1
	737	1
	739	1
	740	1
	741	2
	743	2
	744	3
	747	1
	752	2
	753	2
	755	2
	756	2
	757	1
	759	3
	760	2
	761	2
	762	2
Ernest Tucker	769	2
	776	1
	777	2
	780	1
	786	3
	787	2
	788	1
	794	4
	796	2
	797	1
	810	1
	811	2
	812	1
	853	5 And comment
	899	1

CERTIFICATE OF SERVICE

JOSEPH BEELER, one of the attorneys for Appellants, certifies that all parties required to be served have been served and specifically that he mailed two copies each of the foregoing Brief for Appellant and Appendix for Appellant to the United States Attorney for the Southern District of New York, on this 13th day of June, 1977.

Joseph Beeler

JOSEPH BEELER